More and more companies are establishing innovative programs to encourage their employees to engage in healthier lifestyles and cut health-care costs. These programs range from simply providing educational materials about healthy diet and exercise to comprehensive arrangements where employers identify employees based on their health-plan claims experience and invite them to join rigorous disease-management programs. Employers often combine these programs with incentives (or penalties) to encourage participation.

The government is taking note of these programs. The Treasury Department, Department of Health and Human Services (HHS) and the Department of Labor (DOL) recently issued joint wellness-program regulations. The Equal Employment Opportunity Commission (EEOC) has weighed in on these programs as well. In addition, there often are concerns surrounding the Employee Retirement Income Security Act (ERISA), privacy and tax issues. So, before your company jumps on the wellness bandwagon, keep in mind the myriad of legal issues related to wellness.

Is the Program an ERISA Plan?
Many employers include their wellness program as part of their ERISA-covered health plan, which is often a natural fit. In many cases, the third-party administrator or insurer that handles the health plan also administers the wellness program. But even a stand-alone wellness program might be considered an ERISA plan on its own. The DOL has not issued specific guidance on when a wellness program is an ERISA plan but has addressed similar types of programs in a series of advisory opinions on employee assistance programs (EAPs). In those opinions, the DOL said that if the program offers trained counselors providing individualized counseling, the EAP would be an ERISA plan. It is not uncommon for a wellness program to provide coaching or personal feedback to participants identified with certain health risks. The more comprehensive and individualized this advice is, the more likely it could be considered an ERISA benefit.

What are the HIPAA Wellness Program Rules?
Under the Health Insurance Portability and Accountability Act (HIPAA), a group...
health plan is prohibited from discriminating among participants based on a health factor. Many wellness programs offer rewards, such as premium holidays, lower deductibles or lower co-pays, when a participant achieves a certain health goal. For example, a program may charge a lower premium for nonsmokers or offer a lower co-pay or premium holiday to participants who have met a weight-loss or low-cholesterol goal. Under HIPAA, these programs likely would be considered discriminatory in that they distinguish based on a health factor. However, under the new regulations recently issued by Treasury, HHS and DOL, a wellness program that discriminates is permitted if it meets the following five factors:

1. **Amount of Reward:** The total reward for the wellness program, coupled with the reward for other health-based wellness programs under the health plan, must not exceed 20 percent of the cost of employee-only coverage under the plan. Under the rules, the cost of employee-only coverage includes both employer and employee contributions with respect to that employee. For example, if the annual premium with respect to Employee X is $3,600, of which the employer pays $2,700 and the employee pays $900, the total health-related rewards under wellness programs for that plan cannot exceed 20 percent of $3,600, or $720.

   If a plan offers individual and family coverage, the regulations provide that the 20-percent limit applies to the entire family (so the plan cannot offer 20 percent per person). In addition, if only the employee is eligible for the wellness program, the 20-percent limit must be based on the cost of individual coverage (even if the employee has family coverage). If other family members are eligible for the wellness program, the 20-percent limit should be based on the cost of family coverage.

2. **Reasonableness Standard:** The wellness program must be “reasonable.” The HIPAA regulations state that the program will be considered “reasonable” if it has a reasonable chance of improving health or preventing disease, is not overly burdensome, is not a subterfuge for discriminating based on a health factor and is not “highly suspect” (e.g., extreme or illegal).

3. **Opportunity to Qualify Once Per Year:** The plan must give participants the opportunity to qualify for the reward at least once per year. The preamble to the proposed HIPAA regulations stated that this requirement would prevent a plan from “locking in” a participant based on his or her health when he or she first enters the plan; the participant must have the chance to requalify every year.

4. **Reasonable Alternative:** The program must allow a “reasonable alternative standard” to any individual for whom it is unreasonably difficult due to a medical condition, or medically inadvisable, to satisfy the otherwise applicable standard. The regulations give the following examples:
   • A reasonable alternative to a stop-smoking requirement could be to require the employee to attend smoking-cessation classes.
   • A reasonable alternative to a lower-cholesterol requirement could be to require an individual to follow his doctor’s advice regarding medication and monitoring.

5. **Disclosure of Reasonable Alternative:** The plan must disclose the availability of the alternative standard in all plan materials describing the wellness program. The regulations provide safe harbor language for this disclosure.

What if the Program is ‘Participation Only’ or Does Not Involve the Health Plan?

The new HIPAA regulations clarify that a wellness program only must comply with the HIPAA rules if the program is based on an individual satisfying a health standard to obtain a reward. If none of the conditions for obtaining a reward are based on a health standard (for example, the program is measured merely by participation), the program would not be subject to the HIPAA rules. The regulations noted the following types of programs that would be outside the HIPAA rules:

• A program that reimburses cost of membership in a fitness center.
Under the Health Insurance Portability and Accountability Act (HIPAA), a group health plan is prohibited from discriminating among participants based on a health factor.

- A program that waives co-payments for the cost of prenatal care or well-baby visits to encourage preventive care.
- A program that reimburses employees for smoking-cessation classes without regard to whether the employee stops smoking.
- A program that rewards employees for attending a monthly health-education seminar.

Even if the program offers a reward based on a health standard, it may be outside the HIPAA rules if it has no connection to the employer’s health plan. For example, if an employer sponsors a companywide weight-loss contest and awards winners with cash incentives, the program likely would be considered outside the health plan, so it’s outside of the HIPAA rules. Note, however, the more “benefits” the employer program offers, such as coaching or counseling, the more likely the wellness program itself could be an ERISA plan (as discussed above), and then could be subject to the HIPAA rules.

**Other Issues**

There are a variety of other legal issues that could impact wellness program as well:

- **Americans with Disabilities Act (ADA):** Under the ADA, an employer is prohibited from requiring mandatory health examinations, but is permitted to provide examinations as a part of a “voluntary” wellness program. The EEOC has suggested that this prohibition may extend to employer plans as well. Many plans have begun offering health-risk assessments (HRAs) to employees, which are detailed questionnaires that ask about an employee’s health history or lifestyle. Employers then use this feedback to send the employee educational material about healthy habits or identify at-risk employees for further wellness or disease-management programs. Employers often couple these HRAs with incentives to participate, such as cash rewards, or in some cases, may require participation to enroll in the health plan. The EEOC has not taken a formal position on these programs, but has cautioned that, depending on the facts, these types of incentives or penalties could be considered “involuntary.” The EEOC also has stated that just because a wellness program complies with the HIPAA rules, it does not necessarily comply with the ADA.

- **Tax Issues:** Wellness program rewards run the gamut from cash to gifts, such as TVs or iPods, to lower deductibles or premium holidays. While health plan-related rewards, such as premium holidays, likely are not taxable, cash rewards, gift certificates and other gifts likely will be taxable. In addition, employers may have reporting obligations with respect to taxable rewards. Employers also should be careful what type of tax advice, if any, they provide to participants concerning wellness-program incentives.

- **HIPAA Privacy:** Wellness programs typically receive a large volume of individually identifiable health information, such as claims data, lab results and HRA feedback. This information likely would be considered protected health information (PHI) under the HIPAA privacy regulations. Health plans should make sure they safeguard wellness-program information just as they do other health-plan data. In addition, the plan may need a business-associate agreement with wellness-program vendors. Health plans also should consider who will have access to wellness-program results. This data may need to be de-identified, or the plan may need an authorization, before reporting certain information to third parties, including the employer.

Wellness programs are an emerging area, and employers are establishing creative programs to help employees improve their health and lower health-plan costs. Most wellness-program ideas can be implemented if structured the right way. Before rolling out your exciting new program, be sure to stop and consider the legal issues involved.

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